

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

VOTER REFERENCE FOUNDATION, et al.,
Plaintiff,

VS.

NO. CV 22-00222 JB/KK

Hector Balderas, Attorney General
for the State of New Mexico, et al.,
Defendants.

FINAL TRANSCRIPT

ZOOM HEARING

Transcript of Motion for Proceedings before
The Honorable James O. Browning, United States
District Judge, Albuquerque, Bernalillo County,
New Mexico, commencing on August 31, 2022.

For the Plaintiff: Mr. Eddie Greim; Mr. Carter
Harrison

For the Defendant: Ms. Olga Serafimova; Mr. Dylan
Lange

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1 THE COURT: All right. Good morning
2 everyone. I appreciate everybody making themselves
3 available to me this morning.

4 The Court will call Voter Reference
5 Foundation, LLC, et al., versus Hector Balderas,
6 et al., Civil Matter Number 22-0222 JB/KK.

7 If counsel will enter their appearances for
8 the plaintiffs.

9 MR. GREIM: Your Honor, this is Eddie Greim
10 for the plaintiffs. And I'll let Mr. Harrison
11 introduce himself.

12 MR. HARRISON: Yes, Your Honor. Carter
13 Harrison for the plaintiff as well.

14 THE COURT: All right. Mr. Greim, good
15 morning to you. And Mr. Harrison, good morning to
16 you.

17 And for the defendants.

18 MS. SERAFIMOVA: Good morning, Your Honor.
19 Olga Serafimova for the defendant.

20 THE COURT: All right. Ms. Serafimova,
21 good morning to you.

22 Well, we've got a couple of things here, I
23 guess it might make sense to take up the motion for
24 stay first. But if y'all want to do the ISC first,
25 that's fine as well. But why don't we take up --

1 unless somebody has a different thought -- let's take
2 up the motion to stay.

3 Ms. Serafimova, if you wish to speak in
4 support of your motion.

5 MS. SERAFIMOVA: Certainly, Your Honor.
6 Thank you.

7 So, as the Court is aware, we moved for a
8 stay of the injunction that was granted, and the
9 reasons are three. First, the injunction enjoins the
10 Attorney General's Office --

11 (Zoom audio garbled.)

12 (A discussion was held off the record.)

13 MR. GREIM: Your Honor, while she's doing
14 that. Can you hear me okay?

15 THE COURT: Yes.

16 MR. GREIM: Okay.

17 THE COURT: Go ahead, Ms. Serafimova.

18 MS. SERAFIMOVA: Thank you. I apologize.
19 I had tested my audio beforehand, but I guess there
20 is just some issue.

21 So thank you, Your Honor. So going back to
22 the motion. We believe, as the Court, of course, is
23 aware the standard for a stay is very similar to the
24 standard for granting a preliminary injunction. And
25 we do believe that there is a very strong likelihood

1 that the injunction will be reversed on appeal for
2 three reasons.

3 The first being that the injunction enjoins
4 the Attorney General's Office from prosecuting Voter
5 Reference Foundation for violating the New Mexico
6 Election Code. The Attorney General's Office, or the
7 Attorney General himself, have never been accused of
8 violating Voter Reference's rights or anybody else's
9 rights. There has never been any evidence presented
10 that the Attorney General's Office has violated any
11 of the parties' rights. And certainly there has been
12 no finding by the Court that the Attorney General has
13 so violated anyone's federal rights. And therefore,
14 there is simply no basis to enjoin.

15 THE COURT: Let me ask you this, because it
16 was something I thought of when I was putting the
17 order together: Would the Attorney General just make
18 a representation that it will not prosecute -- I
19 guess, back when I was writing the opinion I wondered
20 if the Attorney General would just make a
21 representation to the Court that it wouldn't
22 prosecute during the pendency of the suit. And I
23 guess now today, even a little more narrow, would it
24 agree to not prosecute during the pendency of the
25 appeal? It seems to me if the Attorney General would

1 make that representation, I might agree with you that
2 the need for a injunction is unnecessary, and then
3 also the need for -- a stay might be appropriate if
4 there is no need for an injunction. Is the Attorney
5 General interested in making that representation?

6 MS. SERAFIMOVA: Well, Your Honor, we would
7 be -- I think we would consider making that
8 commitment if Voter Reference would, in exchange,
9 agree to take down the voter data from their website.

10 THE COURT: I doubt Voter Reference is
11 going to make that deal. So if they don't make that
12 deal, is the Attorney General unable or unwilling to
13 make the representation that it will not prosecute
14 during the pendency of either the case or the appeal?

15 MS. SERAFIMOVA: Well, obviously, I -- you
16 know, that's a decision for my client that I cannot
17 make for them on the spot. But at the same time the
18 question comes up: Why would we agree to do that?
19 If we're not -- if there is no compromise on the
20 table, why would we agree?

21 We do believe, again, as explained in the
22 motion, we do believe that legally we're both
23 required to and entitled to prosecute anyone for
24 violating the New Mexico Election Code. And it's our
25 position that the injunction preventing us from doing

1 that is, in fact, unlawful and it will be overturned
2 on appeal.

3 Maybe I'm misunderstanding the Court's
4 question. I just don't understand why would we agree
5 to do that unless it's in exchange for Voter
6 Reference agreeing to take down the voter data.

7 THE COURT: Well, I think that's what my
8 opinion said -- and I hope it did it artfully -- but
9 it was under some time constraints -- but that the
10 threat of prosecution here, the unwillingness of the
11 Attorney General to say it will not prosecute is the
12 prior restraint. That's the thing that's hanging
13 over the plaintiff's work here is the threat of the
14 prosecution. If the Attorney General says: We won't
15 prosecute during the pendency of this case, or today,
16 during the appeal, then I think that takes a lot of
17 pressure off, and may eliminate need for the
18 injunction and certainly may help you get a stay.

19 MS. SERAFIMOVA: But that would be a
20 meaningless stay, Your Honor. You know, again,
21 perhaps I'm misunderstanding. But first, it's my
22 reading of the opinion that it was the Secretary of
23 State act of publicizing the referral that was the
24 prior restraint. And if the Court is now saying it's
25 something else, I believe that's an amendment of the

1 opinion that's kind of happening in real time.

2 Further, I mean, a prior restraint has to
3 be a protected speech or there has to be a violation
4 of the First Amendment for there to be a prior
5 restraint claim. The Attorney General's Office,
6 again, has never been even accused, let alone found
7 to have violated Voter Reference Foundation's First
8 Amendment rights. I mean, there is no threat of
9 prosecution.

10 If I make a threat to kill the President,
11 there is always a threat of prosecuting me
12 subsequently. But that's not a prior restraint
13 because there is no First Amendment violation.

14 Similarly here, the Attorney General's
15 Office has not violated anybody's right, including
16 Voter Reference. And so the threat of prosecuting
17 them for violating the New Mexico Election Code is
18 simply not a First Amendment issue.

19 THE COURT: All right. What else,
20 Ms. Serafimova?

21 MS. SERAFIMOVA: Well, I think that's the
22 major argument, Your Honor, that again, the Attorney
23 General's Office has not been found or even alleged
24 to have violated Voter Reference Foundation's rights;
25 therefore, they may not be enjoined by this Court.

1 There is simply no legal basis for an injunction
2 against the Attorney General's Office.

3 In the same vein, the injunction prohibits
4 or enjoins the Secretary of State's office from
5 prosecuting Voter Reference Foundation. And it's
6 uncontroverted, as the Secretary of State's office
7 lacks any prosecutorial power, and therefore, that
8 aspect of the injunction has no effect. I mean, the
9 Secretary of State's office has to have both the
10 statutory ability -- you know, they have to be found
11 to have violated the Voter Reference Foundation's
12 federal rights, which the Court has done, and also
13 they have to be able to comply or effectuate the
14 injunction, which in this case they may not, because
15 they are not a prosecutorial entity. They have no
16 prosecutorial power, statutorily or constitutionally,
17 or otherwise.

18 On the other hand, the Attorney General's
19 Office has the reverse problem. They do have
20 prosecutorial authority. But they have not been
21 found to have violated Voter Reference Foundation's
22 federal rights, and therefore, they cannot be
23 enjoined. And that's the major thrust of the motion.

24 Additionally, you know, the Court -- again,
25 going back to the prior restraint argument -- that

1 was a theory that no one had ever brought up, argued,
2 briefed, or presented to the Court. And we provide
3 those citations in our motion. That was
4 essentially -- and forgive me, Your Honor, but from
5 my perspective that was something that the Court for
6 the first time announced in its order. We never had
7 an opportunity to address it, brief it, research it,
8 respond to it. So that's a violation of due process.

9 And, you know, even though I have not found
10 a case exactly on point, we feel confident that
11 the -- that that aspect of the order will also be
12 reversed, because again, it is -- an injunction is
13 premised on a novel theory, which is a new
14 interpretation of what a prior restraint can be. Not
15 only is it a novel substantive theory, but it's also
16 novel in the sense that the parties never addressed
17 it, never brought it up, never responded to it, never
18 saw it really, or heard of it prior to receiving the
19 order granting the injunction.

20 And the final ground for asking for a stay
21 and for believing that the injunction will be
22 reversed on appeal, is the fact that the order really
23 misunderstands, to the extent it's premised on the
24 request for data that was submitted in May -- and I
25 believe it was May 27th of this year by Voter

1 Reference Foundation to the Secretary of State's
2 Office, and our denial of that request, meaning the
3 Secretary of State's denial. The request said -- and
4 again, we are just relying on the language in the
5 letter that Mr. Greim submitted -- the request said:
6 Some information will be uploaded to the website, but
7 voters' personal data or personal information will
8 not be uploaded until we get an order by the Court.

9 And, of course, they don't tell us what
10 they consider to be personal information. And in any
11 event, the statute, 1-4-5.5 says -- I'm sorry, 5.6 --
12 says that it is unlawful to upload any voter data.
13 Not personal information of voters, not whatever
14 Voter Reference Foundation may think should be
15 confidential, but voter data. And voter data is a
16 defined term, and it says, "Any information derived
17 from the registration, certificate." And so
18 essentially in their letter, Mr. Greim let us know in
19 no uncertain terms that they intend to upload some
20 voter data as that term is defined under New Mexico
21 law.

22 And so we let them know that we cannot
23 provide the voter data because it would be a
24 violation of 5.6 for them to upload it. And if we
25 know that they intend to do that, that's essentially

1 a conspiracy on our part. So that was the basis of
2 our denial of their one and only request for voter
3 data in accordance with the New Mexico Election Code.

4 The Court found -- surprisingly found the
5 opposite and said, and held that we disbelieved Voter
6 Reference and what they were telling us, thereby
7 treating them differently from other data requesters
8 who promise to use it lawfully.

9 Well, quite the opposite happened. We
10 absolutely believed, and we absolutely took them at
11 their word. They said some voter data will be
12 uploaded, some will not. But again, the statute says
13 voter data may not be, and you know, that has been
14 consistently our interpretation of 5.6. So those are
15 the reasons why we believe that the order has a high
16 likelihood of being reversed on appeal, which is the
17 major factor in deciding this case.

18 Of course, the public interest, as you
19 know, we have received -- at least at the time that
20 we filed the motion we had received 20 complaints
21 from various individuals regarding uploading voter
22 data on the VRF -- on the VoteRef's website; 16 of
23 them came between July 26, when VRF reuploaded the
24 data, through the date that we filed the motion. I'm
25 happy -- as you know, of course, we did redact them

1 to protect those individuals' privacy and safety.
2 I'm happy to provide an unredacted copy to the Court
3 under seal, or whatever form we can do it, so that,
4 again, their privacy and security is protected.

5 But, again, people are extremely concerned.
6 We are getting numerous complaints, that's the public
7 interests factor. And another piece is that, you
8 know, for residents -- for registered voters who are
9 not part of the Stay At Home Program in April of last
10 year, but have since entered the program, or enter in
11 the future, their home addresses are now online. And
12 they -- VRF does not provide -- or VoteRef.com does
13 not provide a path for someone to just request to be
14 taken down. The only available option is for a
15 person to be part of the Stay At Home Program, and
16 then provide to VRF information that they are indeed
17 part of that program. But under state law,
18 participants in the program are not required to
19 disclose their status. In fact, that weakens the
20 protections that the program provides.

21 So, as you see from the citations that we
22 provided, under state law, only highly trained and
23 individuals who have gone through background checks
24 have access to that information on the state level.
25 But now VoteRev, and VRF essentially, is demanding

1 that participants in the program disclose to -- we
2 don't know whom on their end -- the fact that they're
3 in the program. That person now has that knowledge.
4 They are responsible to take them down off the
5 website. But there is no -- we don't know what kind
6 of security requirement they have, if any. They
7 could be hacked at any point, for example. And the
8 identities of these individuals could become public,
9 and so on.

10 And so this is simply not workable. This
11 website is problematic on so many levels. And we do
12 feel that the public interest factor does weigh
13 strongly in staying the injunction until, again, we
14 have a final decision on the law by the Court of
15 Appeals.

16 And I'm happy to answer any other questions
17 that the Court might have.

18 THE COURT: Let's go back to that first
19 point about the merits. Are you saying that there is
20 no prior restraint because there is no threat of
21 prosecution?

22 MS. SERAFIMOVA: No, Your Honor. I am
23 saying there is no prior restraint because the
24 Attorney General's Office -- first, the Attorney
25 General's Office interprets Section 5.6 the same way

1 that the Secretary of State Office interprets it.
2 And the Court has not held that that interpretation
3 isn't constitutional.

4 So the Attorney General's Office is
5 required by statute to fulfill its responsibilities
6 of prosecuting any suspected violations of the New
7 Mexico Election Code. And that's what they're doing.
8 And the Court has never found -- and again -- I
9 mean -- and I've read the order, as I know all of us
10 have -- but the Court did not hold that the threat of
11 prosecution, first of all, is the issue. The Court
12 said that it was the Secretary of State's Office act
13 of making that threat public; that if they had not
14 done that somehow, there would have been a different
15 outcome.

16 But setting that aside, the Attorney
17 General's Office -- again, if there is no First
18 Amendment violation, there cannot be a prior
19 restraint. If there is no protected speech, there
20 cannot be a prior restraint.

21 THE COURT: All right. Anything else,
22 Ms. Serafimova?

23 MS. SERAFIMOVA: No. But again, Your
24 Honor, the Court has not found that our
25 interpretation of the statute is unconstitutional,

1 and therefore, there is no protected speech.

2 THE COURT: All right. Thank you.

3 MS. SERAFIMOVA: Thank you.

4 THE COURT: All right. Mr. Greim, you have
5 a response to the motion for a stay?

6 MR. GREIM: Yes, we do, Your Honor. And
7 actually, I think our deadline for a written response
8 was Friday. But we were a little bit early. I've
9 got it right here, and I'm ready -- I'll just argue
10 it, and I'll do it pretty succinctly. And I'll just
11 go through each of the three points.

12 On the first point -- I mean, I'm looking
13 directly at the order -- I think, Ms. Serafimova,
14 maybe there is an issue with the wording or
15 something. But, you know, document 51, at page 207,
16 the Court clearly said, "Here, the combination of the
17 Secretary of State's criminal referral and the lack
18 of any indication that the Attorney General will not
19 prosecute Voter Reference for publishing the data
20 that it already has constitute an ongoing form of
21 viewpoint discrimination prior restraint, which the
22 First Amendment does not tolerate." So the Court was
23 very clear, it's the combination. And it mentions
24 both the Secretary of State and the Attorney General.

25 THE COURT: Let me ask you this: Are you

1 comfortable with that wording? Should it have been
2 only the threat of prosecution, the referral being
3 only how the threat was advertised, or how it became
4 public. But is the actual prior restraint the threat
5 of prosecution, or do you think that that's worded
6 appropriately?

7 MR. GREIM: Your Honor, we certainly think
8 it is. I think what I would add to it is something
9 that we had actually not heard until just now, which
10 is the Attorney General now says that they are
11 required and entitled to prosecute. And we didn't
12 actually hear that before. What the Attorney General
13 told us in the prior hearings was that they had a
14 slightly different, you know, version of -- theory of
15 liability than it appeared that the secretary
16 initially articulated. And now we're hearing that
17 they're on the same page. And I mean, if the AG
18 believes that they are required and entitled to
19 prosecute, I don't know what more we need.

20 But I would go further, Your Honor. You
21 know, Ex Parte Young, it's sort of the seminal case,
22 and people still cite it despite the fact that it's
23 100 years old. It's sort of the Grand Daddy of 1983
24 litigation. And Your Honor, that case -- I hate to
25 do this, but I've got to go to this -- that case

1 makes absolutely clear that you -- not only can you,
2 but you have to sue the Attorney General. And this
3 is what the Court said. This is -- the Minnesota
4 Attorney General was sued. The Court said: "It
5 would seem to be clear that the Attorney General,
6 under his power, existing at common law, and by
7 virtue of these various statutes, had a general duty
8 imposed upon him, which includes the right and the
9 power to enforce the statutes of the state,
10 including, of course, is the act in question, if it
11 were constitutional. His power, by virtue of his
12 office sufficiently connected him with the duty of
13 enforcement to make him a proper party to a suit of
14 the nature of the one now before the United States
15 Circuit Court."

16 I mean, it's uncanny the similarity to the
17 language that Ms. Serafimova just used on behalf of
18 the Attorney General: "Required and entitled to
19 prosecute."

20 So, Your Honor, I think we have the threat
21 of prosecution. I think the wording is accurate. I
22 think you also could have added that we have the
23 threat of prosecution. But the other thing I'll say
24 is we have evidence of this. I mean, you'll
25 recall -- and this would be in our written

1 response -- there was evidence that the New Mexico
2 Attorney General is shopping this to the FBI, and
3 they're trying to get the FBI involved as well. The
4 Secretary of State of New Mexico is coordinating with
5 the California Attorney General, where we don't --
6 we're not even present yet.

7 And so New Mexico is absolutely sounding
8 the alarm bell. And when you've got the chief law
9 enforcement of the state also working with the FBI
10 against you, I mean, that's all the threat you need.
11 And it's certainly there, Your Honor. So that's our
12 response to point one.

13 THE COURT: Let me ask a general question,
14 and then I'll come back and ask specific questions as
15 to what you just said. But is there things that I
16 said that you do not think are defensible, or that
17 you do not want to defend that you think I got wrong?
18 Anything in the order that's going to be heading to
19 the Tenth Circuit that you wished I had done
20 differently or said differently or that you don't
21 want to defend?

22 MR. GREIM: Your Honor, the only thing I
23 would say is that we believe that the violation is
24 broader than the Court has. So it's not that we
25 don't want to defend it. We wish we were defending

1 even more. But I think the Court probably already
2 knows that we believe this is an overbreadth issue.
3 But you've heard our arguments on that. I won't
4 repeat them. And I'm sure, as the facts come in in
5 this case, we'll continue to push that. But we have
6 no issue with the theory that you've got here. And,
7 you know, I think one thing we might do in the Tenth
8 Circuit is say that there are multiple grounds on
9 which this could have been justified. That's usually
10 a prudent move when you're on appeal. So we'll
11 probably do that.

12 But Your Honor, we wouldn't back away from
13 anything that the Court has found here.

14 THE COURT: Do you think that the language
15 that you focused on about it being a combination, do
16 you think that is the correct, statement or should
17 the correct statement be that the referral itself is
18 not the prior restraint. It's the threat of the
19 prosecution that's the prior restraint. But because
20 of the unique circumstances of this case, we didn't
21 know about the threat of prosecution without the
22 publicity of the referral. Let's just take that kind
23 of rewritten paragraph. Is that a better paragraph
24 to defend than what I have written? Or do you prefer
25 the paragraph that's written?

1 MR. GREIM: Your Honor, I think -- I'm
2 sorry, I think Ms. Serafimova was going to say
3 something.

4 THE COURT: I'll let you respond here in a
5 moment, but let me hear Mr. Greim's argument. Go
6 ahead, Mr. Greim.

7 MR. GREIM: Sure. I mean, it really is
8 both. This is a situation where the Secretary of
9 State testified or her agents testified that they
10 themselves don't investigate, but they do make
11 referrals. And remember, the Secretary of State is
12 the gatekeeper who said, you know, who has said no
13 the second time, and has sounded the alarm and got
14 the Attorney General involved.

15 So what you get in these cases -- sometimes
16 it's very interesting -- you get a private citizen
17 making a complaint, and sort of acting in concert
18 with a public official. That is the harder area of
19 Section 1983 law.

20 But where you've got one public official,
21 who is the regulator, basically broadcasting not only
22 to us, but to the world, that this is illegal, and
23 exerting political pressure and influence on the
24 Attorney General to do something about this, an
25 Attorney General, who otherwise maybe wouldn't have

1 even known about the issue. I mean, it truly is a
2 combination --

3 (Ms. Serafimova tries to speak. Zoom audio
4 garbled.)

5 MR. GREIM: Your Honor, I was talking. I
6 heard something else in the middle of it.

7 MS. SERAFIMOVA: Your Honor, I need to make
8 an objection.

9 THE COURT: No, Ms. Serafimova. I can only
10 do one at a time. I'll let you respond. But you've
11 got to let Mr. Greim finish his argument.

12 Go ahead, Mr. Greim.

13 MR. GREIM: Yes, I guess I was wrapping it
14 up, Your Honor. I would say it truly is the
15 combination here. And we've got ongoing violations,
16 which we'll get into more, that sort of happened at
17 the end of all this, with the denial of the request
18 that we made. That's the third point.

19 And I think I better save that, because I
20 know Ms. Serafimova wants to answer my second point.

21 THE COURT: Well, no, go ahead and finish
22 your argument, and then I'll let Ms. Serafimova have
23 the last word on her motion. Go ahead, Mr. Greim.

24 MR. GREIM: Sure. So this request for
25 data, you know, is before the Court, the text of our

1 request was before the Court. And you --

2 THE COURT: Let me go back though and
3 finish up the point, because what I hear you saying
4 is you prefer the opinion that we have, you think it
5 is correct, rather than a rewritten paragraph.

6 MR. GREIM: Yes, Your Honor, I mean, with
7 the asterisk that, of course, we believe an even
8 stronger ground, or the ground that occurs to us, at
9 least, is overbreadth. But I mean, the Court knows
10 that. But I think the way it's drafted now is
11 correct.

12 I mean, the only other thing I would add
13 is, frankly, based on this hearing today, I mean, I
14 think it only further supports the order, because the
15 Attorney General has now said something I'm not sure
16 we heard before, that the Attorney General believes
17 they're required and entitled to prosecute. And, in
18 fact, they don't want to make a promise that they
19 won't do it while the appeal is going on or the case
20 is going on. Well, that's why we're in federal
21 court, and that's why the Attorney General is here.

22 So I mean, it could not be clearer. I
23 don't think anyone in their right mind would file a
24 lawsuit in this case and not name the Attorney
25 General. It would be committing malpractice if we

1 left the Attorney General out. I mean, the threat of
2 prosecution spurred by the Secretary of State's
3 referral is coming from the Attorney General.

4 THE COURT: Ms. Serafimova made a point in
5 her briefing, and I think she touched on it in her
6 arguments, that you have to treat the two defendants
7 as separate entities. And the Secretary of State
8 doesn't have any enforcement mechanisms or powers.
9 Given the way that my opinion was limited in what
10 relief I gave, would it be better to take the
11 Secretary of State out of the order section, and just
12 have the Attorney General?

13 MR. GREIM: Your Honor, I don't think so,
14 because what would concern us is the Secretary of
15 State -- you know, it sounds like we're hearing now
16 on the third point that we'll get to -- may believe
17 that even what we're doing now constitutes some sort
18 of a violation. So we may have additional complaints
19 and attacks on us in the media, additional complaints
20 to the Attorney General.

21 So I mean, obviously, at this point, the
22 tip of the spear is the Attorney General. That's who
23 the immediate threat comes from. But the threat
24 originates from the Secretary of State.

25 So, Your Honor, I mean --

1 THE COURT: But is just the referral itself
2 a prior restraint? If I have limited the injunctive
3 relief to prior restraint, would it be better to take
4 her out of the injunctive portion, and just have the
5 injunction against the Attorney General, given how
6 narrow the opinion is now?

7 MR. GREIM: Right. Your Honor, I don't
8 think I can say it would be, because, again -- I
9 would concede this: The Secretary of State herself
10 can't prosecute us. So if the Attorney General is
11 blocked, if that threat is gone, the Secretary of
12 State has no independent way to reach out and get us.
13 And she can keep denying requests for data, but
14 that's not a subject of the preliminary injunction.

15 And so I think I'd have to say, as opposed
16 to having neither of them, I would be fine with just
17 having the Attorney General. But we believe it is
18 still appropriate to enjoin the Secretary of State
19 from doing things like preparing additional criminal
20 complaints that would then be referred to the
21 Attorney General. And I think that's the area that
22 this covers.

23 So, you know, we are fine with it. We'd be
24 protected from prosecution, that's for sure, if it
25 were only the Attorney General. But we're not

1 protected from additional complaints being put
2 together by Ms. Pino, Mr. Curtas, Ms. Vigil, the
3 witnesses that we talked about before, saying these
4 are still appropriate.

5 THE COURT: Well, I would be receptive
6 to -- of course, it would depend on the Attorney
7 General and the Secretary of State -- but I think
8 they might have an interest here, given the arguments
9 they made. I would be receptive -- I don't think I
10 can touch the order now that it's gone up to the
11 Tenth Circuit, so I don't think I can touch it -- but
12 if y'all agreed, if you generated an order, amended
13 order, saying the Secretary of State is not enjoined
14 because she doesn't have prosecutorial powers, I'd be
15 receptive to signing that and amending it. And I
16 think that would be a good thing going up on appeal.

17 So think about that. That obviously would
18 take the concurrence of the Attorney General and the
19 Secretary of State. But given the arguments they've
20 made, I think they might be receptive to taking the
21 Secretary of State out of the injunction portion.

22 All right. What else do you have, Mr.
23 Greim?

24 MR. GREIM: I'll go back to my last point
25 on the request for data. And I just was going to

1 say, you might recall we questioned Ms. Vigil -- at
2 least Ms. Vigil, I can't remember who else now, at
3 our hearing -- because, if I recall correctly, the
4 written response from the Secretary of State to our
5 request for data was due a day or two after our
6 hearing, just by coincidence.

7 So I tried to ask: What's going to be the
8 response here? And, you know, in that testimony we
9 heard nothing about this parsing of personal
10 information versus voter data, and that being a
11 concern of the Office.

12 And then later, in our proposed findings
13 and our submissions we made to the Court afterwards,
14 this theory that somehow the real reason that we were
15 rejected was that we used the phrase personal
16 information, sort of threw them into a tizzy, and
17 they couldn't be sure anymore that we were really not
18 going to post voter data.

19 And Your Honor, I'll state for the record
20 here, to the extent it matters, you might recall that
21 there are two main activities that VRF is involved
22 in. One of the activities is we have the data up
23 there for the crowd sourcing and for people to find
24 errors and contact the Secretary of State, and make
25 the voter rolls more accurate.

1 The other one, though, is we do our own
2 analysis and we publish that analysis. That
3 analysis, though, doesn't have the personal data of
4 any person -- of any voter. It just says that, you
5 know, there is 2,000 more people that voted that
6 aren't on here, or vice versa. And it shows that
7 there are differences in the data that need an audit
8 trail. And there was a lot of testimony about that.

9 So our point was that, look, none of the
10 data that shows the name of a voter, their personal
11 information, is going to be up there without an order
12 of the Court. That's the simple thing. I can't
13 believe that not everyone understood that. But
14 regardless, the Secretary of State never tells you
15 what they think the differences are. In fact, they
16 are now somehow reading the letter to suggest that
17 we're going to put voter data on the website. But if
18 that's true, then I guess everybody who even talks
19 about the data, just from a numbers perspective, I
20 guess they're all violating the law as well. And
21 that would be an even crazier interpretation of the
22 law.

23 But my point is, Your Honor, that this post
24 has rationale that they're apparently going to use in
25 the Tenth Circuit for why they denied it should not

1 be given any credit, was never raised before the
2 Court, and it doesn't fit.

3 The only other thing I'll say on this
4 balance of equities, there are no new arguments
5 coming from the Secretary of State. They say they've
6 gotten 20 complaints. One thing we were going to
7 point in our written response, several of those
8 people aren't even from New Mexico. They are people
9 who read press reports about the decision. At least
10 a few of those complaints are clearly motivated by
11 partisan ideology. They call our client "a partisan
12 organization, that's Republican leaning," and that's
13 what makes them upset about it. It's in the record,
14 you can read those. That's why they're complaining.
15 Another person says: We understand that this data is
16 being put on the internet to cause voter
17 intimidation. And what are they citing? Statements
18 they think they've heard from the Secretary of State
19 about this case.

20 So, to the extent the Secretary of State is
21 issuing more public statements like the ones we
22 pointed to at trial (sic), that vilify VRF and attack
23 the Court's decision, and try to enflame voters, now
24 those are being used to show that the public interest
25 is against the Court's decision, I just think it's

1 invalid, Your Honor. I mean, if that were the basis
2 for a judicial decision or a Secretary of State
3 decision, that would itself be viewpoint
4 discrimination. We can't listen to voters saying:
5 We don't want a Republican-leaning organization
6 having us on the internet, and say: Well, there is a
7 public interest against having Republican-leaning
8 organizations having things on the internet, so,
9 yeah, we're going to take that into account on the
10 injunction. That would be serious error. But it's
11 an error that the Secretary of State now invites with
12 its response.

13 So I didn't mean to spend so long on that.
14 I know Ms. Serafimova did not spend a long time.

15 But the last thing I want to point out,
16 though -- this is really the last thing -- is about
17 this Safe At Home Program. And VRF is accused of
18 making it really hard for people. Well, we tell the
19 Secretary of State's Offices before we even put the
20 data up: Please tell us -- go -- before you give it
21 to us, make sure that there is no one in your Safe At
22 Home Program on the list. And if it turns out that
23 somebody is on the list, we scrub it off. And, in
24 fact, that happened twice, right after the Court's
25 order came through. Ms. Serafimova contacted us and

1 said: You know what, on the list that you guys got
2 back in April of last year, there are actually a
3 bunch of people on that list who are on the Safe At
4 Home Program that shouldn't have been on the list.
5 So they asked us to go in and purge our files as
6 quickly as we could and take that off the internet,
7 and we acted as fast as we could. I think we did it
8 on that very day.

9 So to accuse us of not really respecting
10 the Safe At Home Program is belied by our conduct in
11 working with the Secretary of State's Office just one
12 month ago. And we would have shown those
13 communications in our response, but I'll just orally
14 state them here.

15 Your Honor, that's all I have. We
16 respectfully believe that the motion should be
17 denied.

18 THE COURT: All right. Thank you, Mr.
19 Greim.

20 Ms. Serafimova, if you wish to have the
21 last word on your motion, you may do so at this time.

22 MS. SERAFIMOVA: Yes, Your Honor. Thank
23 you.

24 So first of all, going back to the first
25 point, Ex Parte Young says that if there is an

1 unconstitutional statute that is enforced by the
2 Attorney General's Office, then the Attorney
3 General's Office is the proper party. And this is
4 why I started -- and we say in the motion: The Court
5 did not find that either 5.5 or 5.6 are
6 unconstitutional. The Court, likewise, did not find
7 that our interpretation is in itself
8 unconstitutional, 5.6.

9 And contrary to what Mr. Greim suggested,
10 from the very beginning, the Secretary of State's
11 Office and the Attorney General's Office have been on
12 the same page with respect to their interpretation of
13 5.6. And we have said that in every hearing. And we
14 explained in one of the very first hearings that
15 nobody is prosecuting VRF under 5.5, because we don't
16 believe that they fall under that section, because
17 they never -- at least at the time filed an
18 affidavit. But we interpret 5.6 as prohibiting the
19 uploading of voter data. And that's where they're
20 believed to have violated the Election Code. That
21 has never changed. And any suggestion to the
22 contrary is simply not factually true.

23 Again, very important, the Attorney
24 General's Office cannot -- absolutely cannot enforce,
25 of course, an unconstitutional statute. But that's

1 not the case here. 5.5 and 5.6, and our
2 interpretation of both of those sections, have not
3 been found to be unconstitutional. So, yes, the
4 Attorney General's Office has the statutory mandate
5 to enforce New Mexico law, including the Election
6 Code. And if we believe that a violation is
7 occurring -- "we" meaning the Attorney General's
8 Office -- yes, we are entitled and required to
9 prosecute. But, again, unless there is either an
10 unconstitutional statute or some other violation by
11 the Attorney General's Office of plaintiff's rights,
12 the Attorney General's Office simply cannot be
13 enjoined from doing its job. This is an issue of
14 comity, an issue of state rights.

15 The Attorney General's Office is an
16 independent entity under state law, under the New
17 Mexico Constitution and statutes. It has no control
18 over the Secretary of State's Office, and vice versa.

19 And by the way, the suggestion that there
20 has been political pressure from the Secretary of
21 State's Office on the Attorney General's Office,
22 that's where I was trying to lodge an objection, that
23 is not in the evidence. That is Mr. Greim's personal
24 opinion, and has no place in today's hearing or in
25 the record or in the Court's decision making process.

1 That is simply not factual. And there is no evidence
2 of any political pressure or any other, you know,
3 control by the Secretary of State over the Attorney
4 General's Office, or vice versa.

5 So again, threat of prosecution is only the
6 first step for prior restraint or for 1983 action.
7 The threat has to be something illegal, either to
8 enforce an unconstitutional statute, or to otherwise
9 violate the plaintiff's rights. And there is no
10 allegation that the Attorney General's Office has
11 done that either. There is no evidence, and there is
12 no finding to that effect.

13 So the fact that the Attorney General's
14 Office is collaborating with other law enforcement
15 entities, again, irrelevant, unless and until
16 plaintiff can establish that the Attorney General's
17 Office is violating their federal rights in some form
18 or fashion. And they have utterly failed to do so,
19 even though we've essentially had a trial on the
20 merits already in this case.

21 And if -- I'll look at my notes real quick.
22 The other point, Your Honor, if 207 is really now the
23 controlling holding of the Court, that is the
24 combination of, you know, the referral and the threat
25 of prosecution that constitutes viewpoint

1 discrimination and prior restraint, well, that also
2 is a theory that was not advanced by plaintiff. They
3 never, ever lodged that theory. They never briefed
4 that theory. They never presented that theory until
5 right now, when the Court specifically asked Mr.
6 Greim: What would be the best holding for Mr.
7 Greim's client, which -- I'm sorry, Your Honor, with
8 all due respect, it seems to me extremely
9 inappropriate.

10 The Court is an independent decision maker.
11 And to solicit from one of the sides what would be
12 the best wording of the order for them to succeed on
13 appeal, just -- forgive me if I'm misunderstanding
14 your intentions and what you were doing, but that
15 just seems completely inappropriate, and I would ask
16 the Court to just make its decision based on the
17 briefing, based on the arguments, and not
18 essentially, you know, again, take on the role of
19 advocate for one of the parties.

20 So again, we provided citations in the
21 motion. Because plaintiffs understand Ex Parte
22 Young, and the fact that in that case there was an
23 unconstitutional statute that was being enforced by
24 the Attorney General's Office, their theory from the
25 beginning has been that the use restrictions, meaning

1 5.5, is unconstitutional. And at some point, after
2 the Court's prompting, they started arguing that
3 perhaps 5.6 is also unconstitutional, or our
4 interpretation of it, and there is an overbreadth
5 problem, which the Court, of course, rejected.

6 So they very much understand that the law
7 requires an unconstitutional statute for them to sue
8 the Attorney General's Office. There is no such
9 statute. There is no finding of an unconstitutional
10 statute in the order. And they never made that
11 argument. And, you know, again, if now, all of a
12 sudden, the position is that the order says it's a
13 combination of the Secretary of State's referral and
14 the threat of prosecution, again, that's a new theory
15 that was not -- that we, defendants, did not have an
16 opportunity to respond to, because it was never
17 raised by the plaintiff. It was never argued by the
18 plaintiff. It was never briefed by the plaintiff.
19 It appears, apparently, in a one-sentence mention on
20 page 207 in the order. And now the plaintiffs are
21 grabbing on to it because they realize that there is
22 a major, major problem here, because again, the
23 Attorney General's Office is absolutely entitled to,
24 and required to, enforce constitutional state
25 statutes that it has reason to believe have been

1 violated.

2 And that's where we are. 5.5 has never
3 been found to be unconstitutional. 5.6 has never
4 been found to be unconstitutional. And the Court
5 specifically rejected the argument that our
6 interpretation of those statutes is unconstitutional
7 in some form or fashion.

8 I think that's what I have on the first
9 point.

10 The second point, you know -- and again,
11 regarding the May 27 request, I'll just read it into
12 the record what the letter that Mr. Greim wrote
13 says -- and the relevant sentence says, "Just as VRF
14 publishes voter data for many other states, and as it
15 recently published voter data in New Mexico, VRF
16 intends to publish the requested information online
17 for election-related purposes. But it will only
18 publish the personal information of voters online if
19 VRF is granted relief in this matter, or in any other
20 legal proceedings."

21 If Mr. Greim wanted to say something else,
22 he could have. He knew how to do it. He should
23 have. This is what he chose to say. He chose to
24 reference voter data twice; then he let us know that
25 they will publish the requested voter data online for

1 election-related purposes, which he argues and
2 testifies today for the very first time. And then he
3 says, "We will only publish the personal information
4 of voters online if granted relief."

5 Yes, he did question Ms. Vigil on this
6 point. However, as the record reflects Ms. Vigil --
7 first of all, she was being asked to divulge
8 attorney-client protected communications. And she
9 did not do that. She mentions the concern about a
10 conspiracy several times. When we objected off the
11 record, I explained to the Court that she's not an
12 attorney, and that she's following -- and actually
13 herself testified that she was following the advice
14 of counsel.

15 At that point, the letter had not been
16 finalized, she had not seen it. That letter that was
17 issued the next day says verbatim, "As you know from
18 this" -- somewhat verbatim -- "from this
19 litigation" -- which is shorthand for our explanation
20 of this case -- "and otherwise, it is our position
21 that publishing any" -- and that is italicized --
22 "any New Mexico voter data on our website is a
23 violation of the New Mexico Election Code that
24 carries criminal liability. As such, we believe it's
25 prudent to delay production of this data at this

1 time."

2 So we let them know. And then we cite the
3 conspiracy section, which is 1-20-15 of the Election
4 Code. So we told them the very next day. It is our
5 position, and it has always been our position
6 throughout this litigation, that publishing any New
7 Mexico voter data on a website is a violation. And
8 there is no exception for nonpersonal information or
9 limitation to personal information only.

10 And the last thing I would like to say
11 about the Safe At Home Program: Contrary to how Mr.
12 Greim apparently interpreted my words, we were not
13 accusing them of not respecting the program. That is
14 not the issue. The issue is that -- let's say --
15 I'll use myself as an example -- I am on the VoteRef
16 website right now. If tomorrow I have reason to
17 enter the Safe At Home Program, the only way for me
18 to take my address down would be to go through the
19 state process of getting accepted into the program,
20 and then disclosing the fact that I am now a
21 protected person under the program to VoteRef.com. I
22 do not know who I'm providing that information to. I
23 don't know how it's saved. I don't know what kind of
24 safeguards they have on their end that protects my
25 privacy from now on and my safety. But New Mexico

1 law says that participants in the program only have
2 to disclose that fact, the fact that they're
3 participants to the Secretary of State's Office, and
4 then let's say the DMV or some other state agency,
5 that has their actual physical address, so that they
6 can then substitute it for, essentially, a fake
7 address that the Secretary of State's Office gives
8 them.

9 So it is a violation, as we argue in the
10 motion, of public policy, for me to now be required
11 by VoteRef to tell them that I'm actually in danger;
12 that I need protection, and to beg them, essentially,
13 to take me down. And yes, maybe they do it without
14 issue every time. But that is not the point. That
15 is not guaranteed. Again, the law does not require
16 that. They're not required to have any -- you know,
17 any safety precautions. We have no idea how they
18 safeguard the data from being breached, and so on.
19 And we also don't know who works for them. We have
20 no idea if persons are -- you know, if they're doing
21 background checks or could, perhaps, use that
22 information for some purpose that they shouldn't.

23 And so, if you'd give me one second, I
24 don't want to forget anything, because this is the
25 last opportunity we have to talk about this

1 injunction for now.

2 The only final point, Your Honor, is as we
3 mentioned in the order, the First Amendment -- and
4 just generally, injunctions require an ongoing
5 violation. There is no ongoing violation. And
6 that's another significant problem with the order,
7 and why we believe it will be overturned on appeal.

8 So just quickly to reiterate, again, threat
9 of prosecution is a necessary, but not sufficient
10 requirement. It has to be threat of prosecution with
11 something unlawful, either an unconstitutional
12 statute or some other violation of rights. And the
13 Attorney General's Office has not been found -- has
14 not been accused, has not been found to have violated
15 plaintiff's rights in any way. And the Court seems
16 to acknowledge at this point that the Secretary of
17 State's Office should not be enjoined under the
18 order. And if we take out the Secretary of State's
19 Office, then the whole order should be set aside to
20 be reversed, vacated, because the Attorney General's
21 Office -- again, the office is a separate person
22 under 1983; has not violated anybody's rights; has
23 not threatened to violate anybody's rights; and also
24 is not threatening to prosecute under an
25 unconstitutional state statute.

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1 Thank you, Your Honor.

2 THE COURT: All right. Thank you,
3 Ms. Serafimova.

4 Well, I'm going to deny the motion to stay.
5 I know that the defendants have to ask here before
6 they go to the Tenth Circuit. But I did the best I
7 could, under very short circumstances -- we had some
8 COVID in our chambers during that time, so that
9 complicated the writing of it -- but I did the best I
10 could under the restraints that we agreed to. And I
11 think that the core of it is sound.

12 I think that the plaintiffs got the
13 information legally. They didn't make any
14 misrepresentations on the information that's posted.
15 And the threat of prosecution, I think, constitutes a
16 prior restraint that needs to be enjoined.

17 As I indicated, I will be receptive to an
18 order taking the Secretary of State out, now that the
19 order itself is so narrow, just leaving the Attorney
20 General in. So if the plaintiffs are interested in
21 that -- sounds like the State is as well -- I would
22 be receptive to signing that.

23 Otherwise, if the parties can't agree on
24 that, then it will just have to stand. Because the
25 order has been appealed, and I don't think I can

1 touch it without y'all's consent. So I'll deny that
2 motion.

3 Shall we now go to the initial scheduling
4 order?

5 I will add on the other factors, I still
6 think the opinion is sound on the First Amendment
7 analysis. And on the other factors, I think, when
8 you've got a First Amendment violation, the other
9 factors have to be pretty overwhelming. And while I
10 understand there has been some complaints and
11 criticisms, I think, actually, given the interest in
12 the issue, it's been pretty muted -- and so I think
13 still the First Amendment trumps those, and the
14 stronger factor here, suggesting that the First
15 Amendment rights need to be vindicated.

16 All right. I have read your joint status
17 report and provisional discovery plan. Of course,
18 I'm more familiar with this case than I am many
19 others when I get to this point, because of the work
20 we've done on the preliminary injunction. But is
21 there anything else you'd like to say to the Court
22 about the case that might impact scheduling or how
23 we're going to handle matters, Mr. Greim?

24 MR. GREIM: I don't think so, Your Honor.
25 The only thing I'd say is that we commit to talk to

1 the defendants about this idea on the amended order
2 and get back to you on -- something within, let's say
3 four days. That's not in our report, but I just
4 throw that out there.

5 THE COURT: Okay. Anything else, Mr.
6 Greim, that might impact scheduling or how we're
7 going to handle matters?

8 MR. GREIM: Nothing else, Your Honor.

9 THE COURT: How about you, Ms. Serafimova?
10 Anything else that you want to tell the Court about
11 the case that might impact scheduling or how we're
12 going to handle matters?

13 MS. SERAFIMOVA: The one thing is that --
14 and I've spoken to Mr. Greim about this -- I am
15 leaving the Attorney General's Office. I was hoping
16 to know this morning who will replace me. We have
17 taken -- I should know by the end of the day. We
18 have taken that into account in agreeing to
19 deadlines. But again, you know, just something for
20 the Court to be aware, that the new person may
21 request additional time. I just don't know.

22 THE COURT: Okay. Well, we always have
23 that issue in a case. And we'll set deadlines, and
24 then if they need to be adjusted, then y'all talk,
25 and y'all agree, I'll almost always go along with

1 anything. And if you can't agree, just call
2 Ms. Rotonda, and I'll get on the phone -- or like
3 we're doing here -- and try to work it out.

4 So let me give you some dates. And most of
5 these your dates. So discovery will end on February
6 14, 2023. All discovery motions will be due no later
7 than March 6, 2023.

8 The plaintiffs will identify their expert
9 or experts by the end of business on December 1st,
10 2022. When I say identify your expert, that means
11 identify your expert, produce your expert reports,
12 have your experts ready to be deposed. They don't
13 have to be deposed that day, but have them ready to
14 go because the defendants are going to have to do
15 their disclosures in pretty short order, on January
16 27, 2023.

17 I will note for y'all that the JSR, PDP
18 this document 62, I'm looking at page 6 provides
19 that, quote, "the reports from retained experts under
20 Rule 26(a)(2), due from a party rebutting previously
21 disclosed testimony, by January 27, 2022." The dates
22 provided throughout the rest of it reflect that this
23 is likely a typographical error, and so I've made it
24 2023. If that's not your intention, let me know.
25 But I don't think the defendant's time has expired,

1 so I think it's 2023.

2 All right. All pretrial motions will be
3 due no later than March 16, 2023.

4 Let me drop down and give you some dates
5 for interaction with the Court, because this is one
6 area that I have a wrinkle that I want to talk to you
7 about. Because we're basically talking, roughly,
8 about 180-plus-day track here, so this is a pretty
9 long track. So I'll set a motion hearing on all
10 pending motions for April 17, 2023 at 1:30 p.m.

11 And then I'll put you on my trailing
12 docket. Don't panic, I'll tell you how I run my
13 trailing dockets in a moment. But I'll put you on my
14 trailing docket for a bench trial on June 12, 2023,
15 at 9:00 a.m. The reason I have to run trailing
16 dockets is because the crush of criminal cases in
17 this district. And so, if I tried to give you a firm
18 setting at this point, it wouldn't mean anything.
19 And I hate to give you deadlines by which you have to
20 meet, and then the one I give myself I can't commit
21 to. So I have to run trailing dockets.

22 But, as a concession to the civil lawyers,
23 as you get closer to that June 12th date, and you
24 need to get witnesses here and subpoenas out, call
25 Ms. Rotonda and we'll give you a firm setting. I can

1 almost always try you in the month in which I've got
2 you on a trailing docket, particularly with a
3 three-day bench trial, we should be okay and get you
4 in there. But that's probably the best I can do at
5 this point is run you on a trailing docket that far
6 out.

7 Now, let me talk to you a little bit about
8 the pretrial conference. You had requested a
9 pretrial conference in early March of 2023. I will
10 give you that, if you want it. But if you look at
11 this schedule, it seems to me that may be a little
12 early. So what I was going to suggest is that we
13 have the pretrial conference on June 1st, 2023, at
14 9:00. Let's get through those motions and give me a
15 little bit of time to absorb those motions, and then
16 have the pretrial conference. But if y'all want one
17 in early March, that's fine. If you want two, that's
18 fine as well. But I would propose June 1st, 2023 at
19 9:00 a.m. Would that work for you, Mr. Greim?

20 MR. GREIM: It does, Your Honor.

21 THE COURT: Would that work for you,
22 Ms. Serafimova?

23 MS. SERAFIMOVA: Yes, sir.

24 THE COURT: Okay. So we'll make it that
25 date. Then, with that, the PTO, the pretrial order

1 will come from the plaintiffs to the defendants by
2 the end of business on May 25, 2023. Then the PTO
3 will come from the defendants to the Court by the end
4 of business on May 31, 2023. And then I'll look at
5 it overnight and be ready for your pretrial
6 conference that morning.

7 I think that's all the big deadlines.

8 The plaintiff intends to file an amended
9 complaint for declaratory injunctive relief. The
10 plaintiff shall be allowed until October 7, 2022 to
11 amend the pleadings. I understand the defendant's
12 consent to the plaintiff's amendment, but they
13 reserve all rights to file a responsive motion to
14 dismiss under Rule 12. So this deadline doesn't
15 change the substantive requirements of Rule 12. If
16 you have the ability to do it as of right, you need
17 to do it by that date. And if you have the
18 availability -- if you need consent of the Court, you
19 need to file your motion by that date. So it doesn't
20 change the substantive requirements.

21 The plaintiff doesn't intend to join
22 additional parties, but I am going to set a deadline
23 in case they want to do that, and that will be
24 November 7, 2022, to join additional parties or amend
25 the pleadings. And again, it doesn't change the

1 substantive requirements of Rule 12. It just states
2 a deadline if you have a right to do that. And I
3 know the plaintiffs don't intend to join additional
4 parties and the defendants don't intend to file
5 amended pleadings or to join additional parties, but
6 I'll set a deadline for both of you consistently on
7 that.

8 I'll order that supplementation under Rule
9 26(e) will be due December 1st, 2022, and as
10 otherwise required by Rule 26(e). So we're leaving
11 in the timely requirements, and then setting a hard
12 deadline.

13 The possibility of settlement is unlikely
14 so I will not communicate anything to the magistrate
15 judge. If he or she contacts you and wants a
16 settlement conference, y'all can explain it to him or
17 her. I guess this is Judge Khalsa, so you can
18 explain it to Judge Khalsa. And I'll let her deal
19 with that. I won't get involved in any sort of
20 settlement discussions. But I won't communicate with
21 her either about any particular time. Initial
22 disclosure shall be exchanged by September 16, 2022.

23 A few things on how I do things: On
24 discovery, I find that most civil lawyers just need
25 an answer. So if you'd like to take advantage of

1 that, just call Ms. Rotonda and I'll get on the phone
2 with you and try to work it out. Occasionally, I
3 have to look at something like an RFP or an
4 interrogatory to make an informed decision, so if
5 you'd like to -- so it might take two or three days.
6 But most of the time I can give you an answer on the
7 phone, and at a minimum, pretty short order.

8 If you prefer to formally brief a discovery
9 dispute, that's fine as well. We'll treat it like
10 any other motion. I'll talk to you about that in a
11 moment. And if you would prefer that Judge Khalsa do
12 the discovery, that's fine as well. I'm on default,
13 so if I don't hear from you, I'll do my own
14 discovery. But if you'd prefer that Judge Khalsa do
15 it, just contact Ms. Rotonda and tell her that.

16 On motions, you have an obligation to meet
17 and confer before a motion is filed in federal court.
18 That's required by the Federal Rules of Civil
19 Procedure, as well as the local rules. What I'm
20 about to tell you is not required, but I make myself
21 available. I find that if I'm inserted into the meet
22 and confer process earlier, issues kind of fall by
23 the wayside, and we really begin to focus on what the
24 Court needs to do, and what the issue may really be.

25 So if you'd like to take advantage of that,

1 call Ms. Rotonda, and I'll make myself available, and
2 try to help you streamline discovery. I don't
3 require that. But many districts do. And they're
4 finding that these prefilings conferences resolve
5 97-plus percent of all disputes. So if you'd like to
6 take advantage of that, I make myself available.

7 I don't know your case well enough -- this
8 is one area I don't know whether you're going to have
9 Daubert motions -- but if you get into the case and
10 you think there is going to be Daubert issues, if you
11 can agree on a deadline, that would be great. I do
12 like to get Daubert issues resolved before trial, if
13 I can, or at least have them argued so I can be aware
14 of what the issues are. And if you get in the case
15 and you think there is going to be Daubert issues,
16 but you can't agree on a deadline, just call
17 Ms. Rotonda, and I'll get on the phone or Zoom, and
18 work with you to set a deadline.

19 I guess this case will be here in
20 Albuquerque. We'll just try it here. It seems like
21 the witnesses are here. If there is some reason to
22 try it somewhere else, like in Santa Fe or something,
23 I'm receptive to that. I'm in my 20th year on the
24 bench, and I still haven't been able to get that
25 courtroom up there. But I have moved a little bit in

1 seniority, so it might be possible. So if there is a
2 benefit up there, I'd love to try a case up there,
3 I'd be glad to do it, or at least make the attempt to
4 get the courtroom.

5 Do you, Mr. Greim, have any preference on
6 where the case is tried?

7 MR. GREIM: Your Honor, we probably have a
8 mild preference for Albuquerque, just because we're
9 flying into Albuquerque. Candidly, I have great
10 memories of Santa Fe from a family trip, but I don't
11 think I'll be taking advantage of any of that. So we
12 have a mild preference for Albuquerque.

13 THE COURT: Do you have any preference,
14 Ms. Serafimova?

15 MS. SERAFIMOVA: I think we have a strong
16 preference for Santa Fe because all the witnesses are
17 here, and it would just be easier for the defendants.

18 THE COURT: Well, if there were an
19 agreement, I'd try to get the courtroom up there in
20 Santa Fe. If there is a disagreement, then I'll
21 probably just use the courtroom here. So let's plan
22 on it just being here. If y'all -- if you change
23 your mind, Mr. Greim, and y'all decide you want me to
24 request that courtroom up there, I will. But as long
25 as it's divided, then I'll probably just leave it

1 here and not try to do much up there. So I'll just
2 leave it on my trailing docket here. But if y'all
3 get closer, and you want to try to go up there, talk
4 to Ms. Rotonda, and we'll try to get the courtroom up
5 there if y'all agree on that.

6 Ms. Rotonda, can you think of anything else
7 we need to discuss?

8 THE CLERK: No.

9 THE COURT: I think that's all I need to
10 cover. I'll probably remember something after I get
11 off. Is there anything else we need to discuss while
12 we're together? Anything else I can do for you
13 today, Mr. Greim?

14 MR. GREIM: Your Honor, there is one
15 thing -- and I discussed this with Ms. Serafimova --
16 on the expert deadlines. A couple of districts do
17 this, and I try to work it in, if I have a chance.
18 But rather than giving plaintiff and then defendant
19 deadlines where -- you know, then sometimes the
20 defendant discloses something for the first time, and
21 the plaintiff says: Well, I want a rebuttal to
22 that -- but what I personally think makes more sense
23 is that, if you, in your case-in-chief, have
24 something that you want to put on there, whether
25 it's -- you know, fraud claims or a defense that

1 they're going to raise, affirmative defense or not,
2 that's what the first deadline is for.

3 Then the second deadline is for somebody
4 who wants to respond to that. So that's why the
5 language was a little bit different in the expert
6 section. I discussed that with Ms. Serafimova. I
7 wonder if the Court has a particular preference
8 there?

9 THE COURT: Well, let me look at your
10 wording. If that's the way you set it up -- and
11 maybe I didn't catch this. Let's see what you have
12 here. Okay, it is a little different than what I'm
13 used to seeing. If y'all agree on that, that's fine
14 with me. We'll just use your language.

15 So reports from retained experts under Rule
16 26(a)(2) will be due from the proponent of the
17 testimony by December 1st, 2022, and then from a
18 party rebutting previously disclosed testimony by
19 January 27, 2023.

20 Is that all right with you, Ms. Serafimova,
21 if I just track the language in your initial
22 scheduling -- or your joint status report and
23 provisional discovery plan?

24 MS. SERAFIMOVA: Yes, Your Honor.

25 THE COURT: All right. Anything else, Mr.

1 Greim?

2 MR. GREIM: The only other thing is on page
3 2 of the amendment, the way we have drafted this --
4 and if this is not Ms. Serafimova's intent, then
5 sobeit, you know, it's a matter of consent -- I
6 believe we actually had consent to file the amended
7 complaint, so that we could dispense with filing a
8 motion to do it, they're reserving their right to
9 file a motion to dismiss.

10 THE COURT: If Ms. Serafimova is okay with
11 that, then I'm fine with it as well. Are you okay
12 with that, Ms. Serafimova?

13 MS. SERAFIMOVA: Well, I guess I missed the
14 distinction between what we agreed to and what the
15 Court said. But, yes, that was my understanding. We
16 don't object.

17 THE COURT: Well, I guess the distinction
18 is -- and correct me if I'm wrong, Mr. Greim -- you
19 don't have a right to file an amended complaint. So
20 you need the order of the Court. And what I
21 understand is the defendants have consented to that,
22 so Mr. Greim is saying: Can we just skip the motion
23 and order, given that we have the consent and go
24 ahead and file the amended complaint, and you have
25 the ability to do what you want with it? Is that a

1 fair summary of your argument, Mr. Greim?

2 MR. GREIM: It is. We just want to avoid
3 the motion, and then cite "the leave shall be freely
4 granted where just so requires." That's it.

5 THE COURT: Okay. Is that okay with you,
6 Ms. Serafimova?

7 MS. SERAFIMOVA: Yes, sir.

8 THE COURT: So you can just go ahead and
9 file it, and we'll dispense with the motion and
10 order.

11 Anything else, Mr. Greim?

12 MR. GREIM: Nothing more, Your Honor.

13 THE COURT: All right. How about you,
14 Ms. Serafimova? Is there anything else we need to
15 discuss while we're together? Anything else I can do
16 for you today?

17 MS. SERAFIMOVA: No, Your Honor. Thank
18 you.

19 THE COURT: All right. Well, thank you for
20 your presentations. I will try to get a written
21 order out as soon as possible denying the motion, so
22 that Ms. Serafimova can go to the Tenth and seek a
23 stay there, if that's her intention. But I'll try
24 the get my work done as soon as possible.

25 All right. Y'all have a good afternoon --

1 good morning and afternoon. This is a civil case, so
2 if y'all agree to move anything around, if
3 Ms. Serafimova's replacement needs to move things,
4 and y'all agree, just put it in a motion and order.
5 I almost always can go along. And if you can't
6 agree, don't feel like you have to brief everything
7 up. Just call Ms. Rotonda and I'll get on the phone
8 with you and try to work it out so I can try to help
9 you litigate this case as expeditiously and
10 inexpensively as possible.

11 All right. Y'all have a good day. Let us
12 know how we can help.

13 (The Court was adjourned.)
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1 day.

2 (The Court was adjourned.)

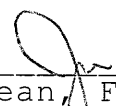
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6 UNITED STATES OF AMERICA

7 DISTRICT OF NEW MEXICO

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9
10 I, Jennifer Bean, FAPR, RDR, CRR, RMR, CCR,
11 Official Court Reporter for the State of New Mexico,
12 do hereby certify that the foregoing pages constitute
13 a true transcript of proceedings had before the said
14 Court, held in the District of New Mexico, in the
15 matter therein stated.

16 In testimony whereof, I have hereunto set my
17 hand on September 7, 2022.

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19
20
21 
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